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TO: The Ontario Human Rights
Commission
400 University Avenue
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AND TO: Mr. C. M. McKeown, Q.C.
Fraser & Beatty
P.O. Box 100
First Canadian Place
Toronto, Ontario

AND TO: Mr. John Sopinka, Q.C.
Fasken & Calvin
P.O. Box 30
Toronto-Dominion Centre
Toronto, Ontario

Re: Morgan v. Toronto General Hospital

I am enclosing herewith my decision and order in the above-mentioned case.

W.S. Tarnopolsky
Chairman
Board of Inquiry

IN THE MATTER of the Ontario Human Rights Code R.S.O. 1970, c.318, as amended.

AND IN THE MATTER of a complaint by Mrs. Margaret Morgan against the Toronto General Hospital.

Appearances

J. Sopinka, Q.C.	- for the Commission and for the Complainants.
M. McKeown, Q.C.	- for the Toronto General Hospital.

The allegation in the complaint which was the subject of the hearings of this Board of Inquiry was that the Toronto General Hospital contravened section 4(1)(a) of the Ontario Human Rights Code because the said hospital refused "to refer or to recruit" Mrs. Morgan "for employment" because of her race, colour, nationality, ancestry and place of origin. Specifically, she alleges not just that she was never hired, of which there is no dispute, but that she was never even granted an interview and therefore was never even seriously considered, and that the reason for this was her race, colour, nationality, ancestry and place of origin.

The hearings into the matter of this complaint were held on May 25th and May 26th, June 28th, June 29th and 30th and were completed on September 7th, all in 1977. With the transcript running to some 864 pages, the hearing was one of the longest ever held under the Ontario Human Rights Code and provides some explanation for the length of time it took for preparation of this decision. In addition to the main subject of the inquiry, a number of related and pertinent issues were raised. Some of these will be dealt with immediately after my summary of the facts, and others in the

course of the decision, including the resolution of it.

One of these issues, which must be referred to here,concerned the fact that I was appointed to hear two complaints--that of Mrs. Morgan, and that of Mrs. Althia McInnis--against the Toronto General Hospital. I will deal later with the objection to my hearing these complaints jointly but it should be explained now that after nearly all the evidence on behalf of the Commission and the Complainant was submitted, there were discussions between the Respondent, the Commission and Mrs. McInnis, at the end of which I was informed that the matter had been settled to the satisfaction of all concerned and that Mrs. McInnis was withdrawing her complaint. I have previously ruled that once a Board of Inquiry had commenced hearings,it was seized of the complaint and any settlement arrived at in the course of the hearings should be submitted by the parties to the Board for approval and inclusion in the decision. However, I did not insist upon this at this hearing because there had been a joinder of complaints, and since one of the two complaints was still being proceeded with, it would not have been fair to the parties if I had insisted on being apprised of the terms of the settlement and the reason for the withdrawal of the complaint of Mrs. McInnis. In any case, since that complaint was settled, this decision concerns only the complaint of Mrs. Morgan.

DECISION

Facts

Mrs. Margaret Morgan is a black woman born in St. Vincent in the Caribbean. She got all her education, including High School, at St. Vincent. In 1971 she came to Canada and then attended Humber College for three years, at the end of which time she received her diploma in Family and Consumer Studies. This was a programme which dealt mainly with nutrition, at the end of which students were required to do specialization in their field of interest, which in her case was specialization at a hospital. During the period of her studies she worked part-time at three hospitals. This included the period from July 10th to September 1st, 1972, working at the Toronto General

Hospital in Housekeeping and Grounds as a summer relief maid. She left on the latter date to resume her studies. From September, 1972, to December, 1973, she worked as a part-time food service aide with the Etobicoke General Hospital. She left there at that time to complete the necessary practical training of interneship during January and February, 1974, at St. Joseph's Hospital.

In April, 1974, she sent off an application for employment to the Personnel Officer of the Toronto General Hospital, but did not receive a reply. I do not place any significant importance to this event because it was clearly, as she said, part of a project at the school in learning how to make up an application.

In July, 1974, after having received her Diploma from Humber College, she saw an advertisement by the Toronto General Hospital for Food Service Supervisors. She walked into the same Personnel Office, asked for an application form, filled it out, gave it to a receptionist, and the latter said "Thank you, we will get in touch with you." She heard nothing further. From November, 1974, to August, 1975, she again studied at Humber College, receiving the One-Year Certificate in Commercial Accounting. During this academic year, in February, 1975, she saw another advertisement purporting to be placed by the Toronto General Hospital for a Food Service Supervisor. She went down to the Personnel Office again (which had been moved from its previous location to 67 College Street) and went through the same procedure of filling out an application form and handing it to the receptionist. She was told: "We will let you know." She heard nothing more and so telephoned. She was given an explanation as to why she was not contacted, which did not satisfy her, and so she was asked to telephone a Mrs. Pupeza, who was the Head of the Nutrition Department. She was told there was a screening process and was asked whether she was contacted. She replied that she had not been contacted, whereupon she was again told that if there was need for her "We will get in touch with you."

Finally, her last application was made on October 3, 1975, in response to an advertisement she saw on October 2nd, which repeated exactly the

same wording she had seen in February. Submitted in evidence were advertisements of February 7th, August 2nd, August 19th, October 4th and October 11th, all of which are identical, and read:

FOOD SERVICE

SUPERVISOR

Several openings
are soon to be
available for
persons with
two years post-
secondary education
in the Food Service
area. Equivalent
experience con-
sidered.

Apply PERSONNEL
DEPT.,
67 College St.,
595-4141
Toronto General
Hospital

The final relevant advertisement submitted was one of November 8th, 1975, which had a slightly different wording:

FOOD SERVICE

SUPERVISOR

Several openings
are soon to be
available for persons
with Community
College Education
in Food Service
plus some experience
at the Supervisory
level.

Apply PERSONNEL
DEPT.,
67 College St.,
595-4141
TORONTO
GENERAL
HOSPITAL

As related previously, on October 3rd she went to the Personnel Office again. This time she brought her grades, as well as recommendations

from St. Joseph's Hospital, where she had done her practical training. There were two evaluations included. One, which was the evaluation of her training as a Food Service Supervisor in Therapeutic Diets, included the following "PERFORMANCE EVALUATION":

> ATTITUDE
>
> very good, seems interested in therapeutic diets.
>
> COMMUNICATIONS AND RAPPORT -
>
> very quiet, but did ask intelligent questions regarding therapeutic diets.
>
> ACTUAL PERFORMANCE -
>
> Good, marked therapeutic menus satisfactorily, will improve with experience. Has basic knowledge of therapeutic diets and applies it reasonably well to marking therapeutic menus. Self-motivated, works well on her own without constant supervision.

The second, which was an evaluation of her training in Food Service Administration, had the following "comments":

> Student has a quiet, relaxed, mature manner. Seems to understand what is involved in supervision. Relates pleasantly to the employees. Should benefit from this experience.

On this occasion of October 3rd, she claims to have given the application to another receptionist, who she claims was not the one she had met on the three previous occasions. That lady, Mrs. Morgan claims, was putting on her coat and had a scarf over her head as if she were going out, and another one was standing at the reception desk. There seems to be some dispute over this event because Mrs. Morgan guessed the time to be around 1:30 to 2:00 p.m., whereas Mrs. Tobin, the regular receptionist, testified that she usually went out for lunch about 12:30 to 1:30. However, Mrs. Morgan was testifying regarding an incident which obviously remained very vividly in her mind, whereas Mrs. Tobin could not remember meeting Mrs. Morgan at all. The times are sufficiently close that Mrs. Tobin might have been coming or going but was quite clearly not the person at the receptionist desk to whom Mrs. Morgan on this occasion gave her application form. It was her she asked to photocopy her supporting evidence in order for it to be stapled to the original application. The woman informed Mrs. Morgan that she would pass the application on to the Personnel Manager, and Mrs. Morgan left.

She heard nothing further and when the advertisement came up again on October 12th she telephoned on the Monday and was told "O.K., I will see that your application goes in." She claims that it was an unfamiliar voice, not that of the woman she had spoken to on the occasions previous to October 3rd. When she heard nothing further again, she telephoned on the Wednesday and was told, by a voice that did sound familiar, that the supervisor, Mr. Peter Dow, was at a meeting. Mrs. Morgan pursued the matter claiming that she had not heard anything after leaving an application. She was informed that possibly she did not have the qualifications for the job. When Mrs. Morgan claimed that she knew three girls who had similar qualifications who were working at the hospital, she was told "I will get Mr. Dow to call you when he gets back in." He did not call. Mrs. Morgan then telephoned Mr. Dow from a subway station and had a conversation with him. She asked him about the application and could remember him saying to her: "I am sorry, Mrs. Morgan, but I can't remember why I turned the application down. I saw your application come up but I can't remember why I turned it down." When Mrs. Morgan got home she found a letter from the Employment Supervisor, Peter Dow. This was obviously a form letter with Mrs. Morgan's address typed in. The letter thanked her for her "letter with reference to a position with the Toronto General Hospital", but continued:

> however, we must advise that we have no forseeable [sic] vacancies for a person of your qualifications. We shall keep your letter on file for a period of three (3) months for future consideration.

After some consideration of these events Mrs. Morgan laid a complaint with the Ontario Human Rights Commission. Following an interview of Mr. Dow by a Human Rights officer on November 25th, 1975, it was arranged that Mrs. Morgan would be interviewed by Mr. Dow on November 26th. After questions about her marital and family status, and what her husband did, the matter of the complaint was raised, and Mrs. Morgan explained that she felt she had the experience for the job. He replied that he didn't think so. She then replied that she knew three girls, all of whom were a year behind her in exactly the same course, who had been given jobs at the hospital. His reply was that they weren't hired, and when she insisted they were, his reply was that maybe they were and maybe they were not. Nothing further came out of that meeting, nor was Mrs. Morgan offered employment at the Toronto General Hospital.

In summarizing the events concerning Mrs. Morgan's application

to the Toronto General Hospital and the events that took place when she was in the Personnel Office, where there is a conflict of evidence, and there was not much, I have decided to believe Mrs. Morgan for a number of reasons. Neither Mrs. Tobin nor Mr. Dow, prior to his November 26th meeting with Mrs. Morgan, could remember her. They could only testify to what "must have been" the events, and not what they could remember them as being. This is not surprising because, as they both testified, she was only one of thousands of applicants whose applications came through that office in a year. Second, to her, as the first-time experience in attempting to get a full-time job in her chosen career, these events must have been very vivid and must have made a marked impression. Third, she would have had to refresh her memory as far back as late October, 1975, once she made up her complaint and was interviewed by a Human Rights officer. In the circumstances, to her it was a much more immediate, personal and, whether she was right or wrong in her assumption that she had been discriminated against, a much more painful experience. In those circumstances the events must have remained much more clearly etched than they would be in the minds of the people she was in contact with, even if the numbers of applicants they had to process was a fraction of the amount they claimed.]

Issues Related to "Fairness"

Just as the hearing opened counsel for the Respondent asked to make a few preliminary remarks under what he termed "the question of fairness and a number of issues under the item of fairness as it is seen in legal terms". There were five issues raised by him:

(1) the production of documents, especially the report prepared by the investigating officers of the Human Rights Commission;
(2) lack of warning by the Commission's investigating officers to people they interviewed to the effect that what they said would be likely to be taken down and used in evidence against them;
(3) the joining together of two complaints;

(4) references or evidence relating to events predating October 3rd, 1975, which was stated in the complaint form as the day of the alleged act of discrimination;

(5) the effect of a press release of the Ontario Human Rights Commission regarding the complaints to be heard at this hearing

After a general opening comment, I will deal with these issues in turn.

Ever since the decision of the Supreme Court of Canada in Bell v Ontario Human Rights Commission [1971] S.C.R. 756 there is no doubt but that the rules of natural justice apply to Boards of Inquiry under the Ontario Human Rights Code. As Reid points out in his book on Administrative Law and Practice (Butterworth, 1971, pp. 58-59) what this means is that while the procedure of a tribunal "need not be that of the courts, nevertheless it must be fair". These rules of natural justice are discussed extensively in every Administrative Law text-book, encyclopedia, and even such studies as that of the McRuer Commission of Inquiry into Civil Rights in Ontario. It would be far beyond the scope of this decision to consider these rules at any length except as they relate to the issues raised. Suffice it to say, however, that the extent of the detailed and specific requirements of these rules is determined by a combination of: the statute creating the tribunal, other applicable statutory requirements like the Statutory Powers Procedure Act, the particular circumstances of the nature of the case, and the elaboration by the judiciary of these requirements in the light of their development of the rules of natural justice. Other than when required to do so by statute, therefore, as quoted earlier from Reid, the "procedure need not be that of the courts, nevertheless it must be fair".

The first issue raised by counsel for the Respondent concerned a demand from him, by letter of May 19th, 1977, for particulars in accordance with s. 8 of the Statutory Powers Procedures Act. This letter was a "demand for production of documents, including all written statements, notes and reports made or obtained by the investigating officers of the Ontario Human Rights Commission during the course of their inquiry into this matter to the extent that the same will be referred to in evidence at the hearing".

He alleged that since there was no response to those demands "we are substantially prejudiced in the circumstances and we are asking for an order now that the documents be produced". He argued that at the commencement of the hearing the Chairman had authority to order production of this material under s.12(1)(b) of the S.P.P.A.: "a tribunal may re

> "a tribunal may require any person, including a party, by summons, to produce in evidence at a hearing documents and things specified by the tribunal, relevant to the subject-matter of the proceedings and admissible at a hearing."

In order to deal with this issue it would be expedient to start by setting out in full the provisions of section 8 of the S.P.P.A.

> "where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto".

Since an allegation that the Respondent discriminated would probably raise the issue of "the good character" of the Respondent, and certainly would impugn his "propriety of conduct", there is no doubt that s.8 of the S.P.P.A. requires the Respondent "to be furnished prior to the hearing with reasonable information of any allegations with respect" to such allegations. Therefore, as Chairman Lederman stated in Nembhard and Manradge v. Caneurop Mfg. Ltd. March, 1976, (from which counsel for the respondent quoted):

> Prior to the hearing, a respondent therefore is entitled to receive sufficient information about the allegations to enable him to prepare his answer to them.

However, as Chairman Lederman also stated in the very next sentence:

> This section does not, however, refer to advance notice of documentary evidence but to reasonable particularity of allegations.

Chairman Lederman then went on to consider the authorities which indicated that although the power to order production or inspection of documents might have been available to a Board of Inquiry previously, it did not appear to be available at the present time and the only related power would be s.12(1)(b) of the S.P.P.A. But again, Chairman Lederman concluded that:

> The authority therein confers no rights of production as such inter partes. It is a summons power akin to the issuance of a subpoena duces tecum by which a witness is compelled to attend the hearing and produce documents into evidence.

With all of the above I am in agreement.

It is true that Chairman Lederman did go on to state that the "expeditious conduct of proceedings" may not be facilitated if counsel is surprised "by the introduction of a report or document that he sees for the first time at the hearing". He made reference to the proceedings of a hearing before an inquiry officer under the Expropriations Act, R.S.O. 1970, c. 154, by s.7(4) of which Act, at least five days before the hearing, the Expropriating authority is obliged to make available for inspection by the parties to the inquiry any documents that he intends to use at the hearing. Chairman Lederman went on to recommend that a similar procedure might provide "a greater measure of fairness to a respondent in preparing for the hearing." Counsel for the Respondent asked me to take that approach. Since it was too late to do so, he asked for access to the documents as the hearing started.

In considering this issue let me state at the outset that certainly neither sections 8 nor 12 of the S.P.P.A. require a tribunal to order production of documents prior to the hearing, although s. 12 does state that the tribunal "may" order that "documents and things as specified by the tribunal" be produced in evidence at the hearing. It would appear, therefore, that a tribunal could order the production of any document unless doing so would contravene s.15 of the S.P.P.A., which makes inadmissable in evidence at a hearing, anything "that would be inadmissable in a court by reason of any privilege under the law of evidence". Therefore, it is necessary to consider what the documents are that were being asked for. The "written statements, notes and reports made or obtained by the investigating officers of the Ontario Human Rights Commission" are prepared initially so that an officer can, pursuant to section 14(1) of the Ontario Human Rights Code, "effect a settlement of the matter complained of", and secondarily, so that, pursuant to section 14a(1), "where it appears to the Commission that a complaint will not be settled", the Commission can "make a recommendation to

the Minister as to whether or not a board of inquiry should be appointed". When a matter, therefore, has not been settled and reaches a Board of Inquiry stage, it is obvious that the Commission will have had to include the notes and reports of the investigating officer in its materials in preparation for the hearing. In addition, since an attempt at a settlement will have been made, these notes and statements include reports regarding the attempted settlement or conciliation. Therefore, on the first basis, these particular notes and reports would be excluded as being part of a document, as counsel for the Commission and the Complainant put it, "for the benefit of obtaining a legal opinion as to whether or not a board of inquiry should be appointed", and in preparation of the case if there is a board of inquiry. On the second ground, since Boards of Inquiry in this province, as well as in other provinces, have consistently ruled that evidence relating to the conciliation phase should, as a matter of public policy, be excluded, it would be impossible to separate out those parts from the documents asked for. It is a totally different matter when other documents are involved which might be submitted in evidence and to which the Respondent should probably have prior access.

Both the rule of natural justice on this point, as elaborated by the courts, and s.8, merely require that the other party be given full particulars as to the case which is required to be met. Although there is no pre-trial discovery in the case of a complaint which comes before a Board of Inquiry under the Ontario Human Rights Code, it should be remembered that the Code does require a proceeding unlike that in any civil or criminal proceeding, and that is that an attempt be made at conciliation towards achieving a settlement. It is hardly conceivable that in the course of such negotiations with the Respondent, (and there was evidence at the hearing both of such meetings and other communications), the Respondent would not be extensively aware of the case that is required to be met.

Therefore, as I decided at the time at the hearing, there is no need either statutorily, or in accordance with any rule of fairness, that the notes and reports made or obtained by the investigating officers be produced at that time or prior thereto. At the appropriate time during the course of the hearing, when these are referred to by the witness who prepared them, copies of them sould be and in this hearing were, made available to counsel for the Respondent.

I may add that similar requests by counsel for Respondents were similarly denied by the following Boards of Inquiry: Nova Scotia--Perry v. Robert Simpson Co. Ltd., February, 1976; New Brunswick -- Stairs v. Maritime Cooperative Services Ltd., April, 1975; Alberta -- Gares et al v. Board of Governors of the Royal Alexandra Hospital in Edmonton, September, 1974.

The second point raised by counsel for the Respondent on the ground of fairness could probably best be referred to in his own words:

> The fact that the inquiry officers who are sent out by the Commission, as I understand their terms of reference, they take down very careful notes of what is said, but they do not give any warning to the persons they interview that what they say is likely to be taken down and used in evidence against them.

Counsel did acknowledge that there was "no statutory obligation for them to do so" but he suggested that:

> On the question of fairness a number of these people are not advised of the facts nor are any of these notes ever read back to them for their verification and to this day they are not aware of what the investigating officers say they said.

It was never exactly clear to me what it was that counsel wished me to do on this point, but I presume it would have been to exclude any such evidence. In any case, I declined to do so. There is no doubt that, as counsel acknowledged, there is no statutory requirement for such a warning. Moreover, there is no doubt but that counsel must have overlooked the fact that in this case, at least, several of the witnesses, for example Mrs. Tobin and Mr. Dow, were asked to read the summary notes of the officer and to sign them. When testifying, they acknowledged that the signature on these notes was theirs. I should, however, add a few more points on this issue.

The first is that quite clearly the Legislature of Ontario chose to deal with discrimination not as a criminal offence, but through an admin-

istrative procedure which is not subject to the same rule on warnings as applies with respect to a criminal proceeding. In any case, in all of the interviews, the Human Rights officer had identified herself, had made reference to the Ontario Human Rights Code, and had explained what the complaint was and who made it. It may very well be that the persons interviewed could no longer remember the details of the interview, but this does not affect retroactively their knowledge at that time as to why they were being interviewed, and that was a part of the process of investigating whether or not the complaint could be verified.

Even if one might be able to argue that apart from any question of statutory requirement of such warning, there would be nevertheless the element of surprise to the witnesses involved, one might be prepared to grant some kind of adjournment in order to consider an explanation of statements made. In the event, in this hearing, there was a one-month delay between the time the Human Rights officer gave her evidence regarding such alleged statements, and the time when she was cross-examined and when the witnesses involved in these interviews gave their testimony.

The third issue raised by counsel for the Respondent concerned the matter referred to briefly at the beginning of this decision, and that is the joinder of two complaints. Although, as indicated earlier, the complaint of Mrs. Althia McInnes was settled to the satisfaction of all parties concerned during the course of the hearing, the decisions about joinder of complaints had to be made at the beginning of the hearing. Therefore I should deal with this issue.

It would appear quite clearly that the judicial process attempts to avoid multiplicity of proceedings if related matters can be dealt with in one proceeding. Thus, although the Rules of Practice of the Supreme Court of Ontario are not binding upon administrative tribunals, nevertheless reference can be made to rule 66 thereof as an indication of the balance between fairness to the parties and the public convenience of avoiding multiplicity of proceedings. Rule 66 states:

> All persons may be joined in an action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or occurrence, or series of transactions or occurrences, is alleged to exist,

> whether jointly, severally or in the alternative, where if such persons brought separate actions any common question or law would arise....

The rule goes on to allow the court to order separate trials upon the application of the defendant "if it appears that such joinder [of plaintiffs] may embarrass or delay the trial of the action". In Canadian Steel Corporation Limited v. Standard Lithographic Company Limited [1933] O.R. 624, Fisher J.A. described the purpose of the rule as follows:

> The object of this rule is to avoid, if possible, the expense and delay of two actions, if relief without inconvenience, expense or embarrassment can be given in one action.

In this particular instance, as counsel for the Commission submitted, the evidence of each of the Complainants would have been led in a hearing of the complaint of the other. Much of the evidence that was led would have applied to either complaint. It is difficult to see how joinder of the complaints could have caused "embarrassment" to the Respondent. Certainly, for all parties, the "inconvenience" and "expense" would have been far greater if the complaints had been heard separately rather than jointly.

There have been a number of hearings under Human Rights Acts where the complaints of several complainants were joined in one hearing. Thus, in Newfoundland, six female complainants were joined in one hearing on the issue of equal pay for equal work: Jones et al v. Sanitary Cleaners Ltd., January, 1971. The same type of case in Alberta saw seven female complainants joined into one hearing: Gares et al v. The Board of Governors of The Royal Alexandra Hospital in Edmonton, September, 1974. In British Columbia three complaints were joined in an allegation of racial discrimination: Lopetrone et al v. Juan de Fuca Hospital Society, February, 1976. Perhaps the most pertinent case was that in Ontario chaired by Professor Horace Krever (as he then was) in Shakil et al v. City of Toronto, February, 1973. Chairman Krever held one hearing into three complaints, two of which were lodged as a result of two of the complainants cooperating with the Ontario Human Rights Commission during the investigation of the first complaint. Despite the fact that the

complaints were separate in time, Chairman Krever heard all three together.

On the fourth issue counsel for the Respondent asked me for a determination "as early as possible" as to how I would treat references in the Morgan complaint to events which pre-dated October 3, 1975, which was stated on the complaint form as the date the act of discrimination occurred. He argued that "we are substantially prejudiced once again in attempting to meet evidence from the Morgan complaint with anything that pre-dates October 3, 1975". As I indicated at the time, it would be very difficult to make an assessment before hearing any evidence as to whether or not events before October , 1975, would have relevance to the determination of this complaint. However, I did indicate at that time, that quite frequently in the case of an alleged discriminatory act, Boards of Inquiry might have to consider circumstantial evidence, absent direct evidence. Frequently such evidence must be considered in discrimination cases, where the motive for denial of access can only be deduced from the surrounding circumstances, perhaps from the attitudes displayed by the Respondent or the Respondent's employees, perhaps from statements made by those in authority, perhaps by comparisons of treatment of those attempting to obtain access. In all these circumstances, events prior to the date on which a person realizes that that person is barred may be relevant in determining the motive for an otherwise unexplainable act. At the commencement of the hearing it would be impossible to make that prior determination.

Nevertheless, it is difficult to see how the Respondent might be prejudiced in preparing for the hearing with respect to those events prior to October 3, 1975, when the complaint set out in some detail the specific dates and events which preceeded October 3, 1975, and which led her to conclude that she had been discriminated against on or around the later date. Obviously, the further back in time the event may be, the less weight it might hold in the determination of the key issue.

The fifth and final complaint presented by counsel for the Respondent was that the Ontario Human Rights Commission had issued a press release that morning concerning the holding of the inquiry. As I understood

this objection, it was being raised not because the Board of Inquiry might be prejudiced, because prior to the reading of the press release at the hearing by counsel, I had not read it. Rather, his complaint was that the public might be prejudiced. Quite clearly the important issue is whether or not such a press release, even if read by a chairman of a Board of Inquiry prior to the hearing, could cause pre-judgment. As mentioned, counsel for the Respondent read the press release, but in any case I have looked at it since then and am unable to see what is contained therein which was not already set out in greater detail in the two complaints which are sent to a Board Chairman with the appointment. The press release speaks of "allegations of racial discrimination", it refers to the fact that the two complainants had made a written application in response to advertisements and were not interviewed, and that the complainants allege that "white applicants with similar or inferior qualifications" received interviews. All of this in greater detail had already been brought to the attention of the Chairman in the complaint form. Even a Chairman conducting a hearing into a complaint for the first time must have sufficient training and common sense to realize that these are allegations.

In any case, apart from building up the case or questioning the "fairness" of the hearing, counsel for the Respondent made no request with respect to this issue for any kind of a ruling and so none was necessary.

Analysis of the Evidence

As I indicated at the beginning of this decision, this has not been an easy complaint to resolve. This is not to say that I am not firmly convinced of the conclusion that I have arrived at, but rather that it took a great deal of comparison of evidence presented in order to explain what took place and, what is more important, why.

Since an allegation of discriminatory treatment, particularly by a public institution such as the Toronto General Hospital, is a very

serious one and, if a Board of Inquiry concludes that a specific complaint has been substantiated, a very unfavourable impression is created in the minds of an informed and enlightened public, let me state at the outset that there was no evidence brought before me which in any way indicated institutionalized discrimination on the part of the hospital. To use a popular expression, the Toronto General Hospital is not "racist". In fact, there was evidence by two trade union leaders which indicated the contrary. Mrs. Guerra, who happened to be of mixed ancestry, including African, who came from Trinidad, and who was president of the union for Medical Technologists, testified that in her four years of trade union experience she had never been aware of any complaints or grievances by her members alleging discrimination against black persons at the Toronto General Hospital, and she claimed that of the membership of 200 there were "several" black persons who are members of the union. In addition, Mr. John White, who described himself as a black man, and who is a representative of the Canadian Union of Public Employees, with about 830 members at the hospital, said that although at least 50% of his employees would be black, in his three and one-half years of experience with the hospital, he had received no grievances from any of these on the ground of racial discrimination, and there was a no-discrimination clause in the contract. In addition, a detailed survey undertaken by the hospital in June, 1977, showed that in the year 1974, out of about 976 new employees hired, about 61 were "Negroid" and probably about 100 or so were of Asiatic origin. In 1975, out of about 1190 new employees, some 76 were "Negroid", and again close to 100 were of Asiatic origin.

Therefore, there is no doubt that at least with respect to non-supervisory positions, the staff of the Toronto General Hospital is multiracial or multi-ethnic. There was no evidence, however, of whether any black persons were employed in supervisory capacities, because both trade union witnesses testified only with respect to employees who could qualify under the Ontario Labour Relations Act and this does not include employees in a supervisory or management capacity. Specifically, Food Services Supervisors are not included as "employees".

It is important to note that we are concerned here with refusal to employ a person in a supervisory capacity. If the same non-discrimin-

atory policy that seems to apply with respect to regular employees were shown to have applied at the supervisory level as well, such evidence would have been almost conclusive. However, at no point was there any evidence of the promotion or the hiring of supervisors who were black. This is not to say that this in fact has not been done, but no evidence of it was presented to me. In fact, with reference to the particular category we are concerned with here, that is Food Service Supervisors, Mr. Dow was faced with the allegation that of the 14 persons hired for this position during his tenure up to January 12th, 1976, not one was black. Since counsel for the Complainant explained that this information was given by the Nutrition Department of the hospital on January 12, 1976, and there was no denial of this by Mr. Dow, nor any contrary evidence on the part of the hospital, I must conclude that this is accurate, and that during the period that Mr. Dow was Personnel Manager, of 14 Food Supervisors hired, all were white except for one "Oriental". The absence of evidence by the hospital of its hiring record with respect to supervisors and management personnel, the situation as outlined above specifically regarding Food Services Supervisors, the fact that in the category of employees serviced by the union of which Mr. White was a member, which included Dietary Aides, Housekeeping Aides, Orderlies and Maintenance, Mr. White stated that "at least 50% would be black", but there was no complementary evidence on behalf of the hospital that there was a comparable proportion amongst the supervisors of these employees, or even evidence of any, all makes the evidence of fair employment practices with respect to regular employees not applicable with respect to the crucial category we are concerned with, i.e., supervisory personnel. In fact, when the Human Rights officer, Miss Gaspar, looked through the files of applications for Food Service Supervisors given to her by Mr. Dow she estimated that of the approximately 168 applicants for the position, about one-half seemed to have an origin in that part of the world where one would expect that the overwhelming majority of the people would be non-white. If approximately half of these applicants were non-white, and yet of the 14 hired all were white, except for one of "Oriental" origin, again the evidence of fair employment practices amongst regular employees is at least matched, if not over-weighed, by these facts.

In light of the above, before considering more specifically the

case of Mrs. Morgan, and the handling of her application by the Personnel Manager, Mr. Dow, let me state that it is quite possible for an employer to be an equal opportunities employer with respect to those employees who do not serve in a supervisory or management capacity, while yet restricting opportunities for promotion or recruitment to the supervisory ranks. It is quite possible, also, that in the case of a large employer, with many departments, not all of which use the same recruitment and hiring practices (and evidence was presented to us that at least in the Department of Haematology alternative recruitment practices were used), it is quite possible in these circumstances that there may be equal employment opportunities, even at the supervisory level in one department (although again there was no evidence from the hospital regarding the supervisory level), while in another department this might not apply because of different hiring and recruitment practices. The decisions, however, with respect to sending applicants for final approval to the Food Services Department, were made in the Personnel Office. Without considering for the moment whether there was any pre-screening, even before the decision of Mr. Dow, certainly an applicant for the position of Food Services Supervisor would appear not to be able to get a further interview with the Nutrition Department without passing through the office of Mr. Peter Dow.

To return to the specific case of Mrs. Morgan, I have to say that I find the application made in April, 1974, not to be pertinent to this case because it was not in response to an advertisement and Mrs. Morgan admits that her application was really in the nature of a project more than a serious consideration for employment. However, the application made by Mrs. Morgan in July, 1974, was in response to an advertisement in the newspaper, but again she heard nothing. Although Mrs. Tobin, the receptionist, testified that all applicants in response to advertised positions who were not hired would receive reject letters, and that this policy was instituted by Mr. Dow from the time he arrived as Personnel Manager early in 1974, Mrs. Morgan got no such letter and there was no evidence that one was sent out. However, there was just not sufficient evidence regarding this period to deduce too much from these events.

By the time of the application made in February, 1975, there is

more evidence that must be considered. As on the occasion of the previous summer, Mrs. Morgan, in response to an advertisement, went to the personnel office in person. She submitted it to the same person as the previous summer, and quite clearly that had to be Mrs. Tobin. Again she received no reply. On this occasion, however, there are other events that one must consider. Three other young female students, who were taking the same course at Humber College as Mrs. Morgan, but who were a year behind her all made application between the 10th and 19th of February, 1975. I will not refer to these three young women by name, but merely by initial. C.L., who applied on February 10th, and was hired as of February 17th, had not listed any employment experience in a hospital nor in food services except possibly as an attendant at the Royal Agricultural Winter Fair. P.G., who applied on February 12th, and was hired as of March 3rd, also had listed no employment experience either in food services or in hospitals. S.C., who applied on February 19th, and was hired as of March 10th, had had summer experience working in food services, but obviously not as a supervisor. By this time Mrs. Morgan had not only completed the same course which these young women had not yet completed, but she was already studying for a Certificate in Commercial Accounting, she had had part-time experience from September 1972 to December 1973 as a food service aide, and had done her practical interneship in January and February, 1974 for her training as a food services supervisor. Although these facts alone would seem to indicate unfairness towards Mrs. Morgan's application in that they were hired and she did not even receive a reply, and although the advertisement in response to which she made her application appeared in the newspaper at least on February 7th and February 9th, and she must have applied soon thereafter, there just was not sufficient evidence submitted to me of the date of her application for me to conclude that her application must have come prior to theirs. The date of the advertisement and the circumstances of her response to it, especially in the light of the fact that she had made efforts previously to find employment at the hospital, would indicate to me that it is quite probable that Mrs. Morgan applied at about the same time as these three or earlier, but I must admit that beyond raising a suspicion, the evidence with respect to this time is not conclusive enough of itself to remove any doubt. It is very likely that she applied before S.C. on February 19th, but probably no sooner than C.L. on February 10th.

Let me just add, however, that based on the application forms alone,

Mrs. Morgan's educational attainments were higher than any of the three, i.e., she was a year ahead of them, she was taking further training in Accountancy, which must be of some aid to any supervisor and, in addition, her experience in food services was more extensive than the first two mentioned, although probably less than that of the third candidate. But in comparison to the third candidate, S.C., Mrs. Morgan had worked in the Toronto General Hospital, even though only as a summer relief maid, and so would have had some minimal familiarity with the physical layout of the hospital, and in addition she had specific apprenticeship training as a supervisor in the food services and nutrition area. Therefore, even though I think it is likely that she applied at or about the same time, or maybe even before the three, even if I am wrong in that, surely she could have been considered soon thereafter since, according to Mrs. Tobin, applications were kept on hand for a period of three months, and two of the three, P.G. and S.C., had left the hospital by May 1st and May 12th respectively.

The crucial time, of course, and the one with respect to which most of the evidence at the hearing was presented, was the application which Mrs. Morgan made at the personnel office on October 3rd, 1975, again following another advertisement for Food Service Supervisors. She did not get an interview. The reason given at the hearing by Mrs. Tobin and Mr. Dow was that since her application form indicated that she had previously worked for the Toronto General Hospital, and since the supervisor's evaluation at the time of her leaving this temporary employment had marked her as in the "do not hire" category, that she must have been screened out by Mrs. Tobin and therefore was never passed on to Mr. Dow.

Following the making of the complaint in the latter part of October, and its re-writing into its final form on November 12th, 1975, the first time that the matter of the "do not re-hire" information was given to the Ontario Human Rights Commission was more than a year later, in December, 1976. Regarding this evaluation, may I say that there appears to be no doubt

but that if, in the engaging-for-employment process, this information were made available, the practice of the hospital appears to have been not to re-hire. I cannot help but comment about the fairness to anyone, of whatever ethnic or racial origin, of such a procedure. Here was a young student, hired as a summer relief maid in the department of Housekeeping and Grounds, who started work on July 10th and was evaluated on August 23rd. During this period there were different shifts and some 50 employees supervised by 2 supervisors. I must say that based upon my limited experience as a supervisor of highway construction crews during three summers in Saskatchewan, and having been Dean of the law school for four years, I am highly skeptical of the ability of a person to make a fair assessment on matters such as work ability, attitude, realibility, ability to work with others, on any adequate basis, in six weeks, particularly when it is one part-time employee out of about fifty. I find this evaluation all the more surprising in view of the fact that Mrs. Morgan testified that her supervisor had told her in person that he was satisfied with her work and that she should come back. In addition, he was prepared to arrange for a letter for her to be sent to the Immigration Department to regularize her immigration status. I must say that I find this evidence credible because she named the supervisor as someone called "Mario" and the supervisor who completed her evaluation form, and who testified had an entirely different name. In addition, although there was no disputing the fact that there was a second supervisor, who could have been the one to whom Mrs. Morgan was referring, no evidence was presented on the part of the hospital that such a person did not exist, or that it could not be someone who was call "Mario". I find Mrs. Morgan's evidence on this point credible as well because I do not see how she would have been prepared to get a letter for the Immigration authorities if she thought her supervisor was prepared to classify her as a person not to be re-hired. Moreover, she went back to the Toronto General Hospital with subsequent applications, and this too indicates to me that she must have thought her previous performance there, probably based upon remarks of a supervisor, were satisfactory, or she would not have returned.

Moreover, although the evaluation appears to have been on her file

since 1972, it seems to me to be a rather hard attitude to take in evaluating a person some three years later, following three years of post-secondary education, with a very good recommendation from her supervisors in her apprenticeship training towards a supervisory role, to hold against her an evaluation made when she was a part-time summer relief maid. Is such a mark to be held against a person forever? Is there no expectation that perhaps the work attitudes between age twenty and age twenty-three can undergo some change? Or that perhaps a person who has the ability to complete further education and preparation at a supervisory level might find making beds and cleaning rooms somewhat boring? Or is there no hope that people can rehabilitate themselves? I find that whole approach somewhat disquieting.

At this point I have to make reference to the fact that when Mrs. Morgan was on the stand she was not cross-examined as to this evaluation. There was some considerable argument as to whether this was not a situation to which the so-called Rule in Browne v. Dunn (1894) 6 H.L.R. 67 applies. According to this rule, as explained in both Cross on Evidence, at page 227 and Phipson on Evidence, 10th ed. at paragraph #1543, where a person is being cross-examined to contest his or her evidence, the opposite version of the facts must be stated to the witness for comment or explanation. Where a person's credibility or credit is attacked, the relevant matters must be put to him or her to provide an opportunity for explanation. However, failure to cross-examine does not always amount to acceptance of the witness's testimony if the witness had notice to the contrary beforehand, or the story is itself of an incredible character. When Counsel for the Commission argued that the evidence of the letter had not been put to Mrs. Morgan, and so should not be admitted in subsequent testimony by witnesses for the Respondent, counsel for the Respondent argued that Mrs. Morgan had notice of such letter since December, 1976. I did not rule out such evidence because, again, this tribunal is not bound by strict rules of evidence and Mrs. Morgan might have been informed by the Commission in December, 1976, that the Hospital had found such a letter. Moreover, even if she could have proved that the evaluation was unfair, and I have indicated how I felt it was unfair, even if it was accurate, that is not the issue here, because there appeared to be no question but that if the existence of a "no-hire" evaluation came up during the engagement-for-employment process, the prospective employee would not pass through.

The only real question, then, is: did this "no-hire" evaluation of 1972 arise at a point in time to make it the reason for not granting Mrs. Morgan an interview and not hiring her?

There was a great deal of testimony both by Mrs. Tobin and by Mr. Dow that an applicant such as Mrs. Morgan, who had previously been employed by the hospital, and who had a "do not re-hire" evaluation, would be screened out by Mrs. Tobin before the application form reached Mr. Dow. They testified that this was an invariable practice. And yet no one, not Mrs. Tobin, not Mr. Dow, not even Mr. Johnson, who was Mr. Dow's superior, nor any one else in the hospital who must have been considering this complaint from November, 1975, to December, 1976, ever raised the matter of this as the reason why she was not hired. It just noes not appear credible to me. No witness testified to any direct knowledge of exactly what happened to the Morgan application. When interviewed by the Human Rights officer in February, 1976, Mrs. Tobin did not give that as a reason. Mrs. Tobin read the complaint form as well as Mrs. Morgan's application form, and yet she did not think of this "invariable" rule. She described herself as a person who screened, but did not hire applicants, and stated that her screening involved looking for educational and practical experience. Upon reading Mrs. Morgan's application form, Mrs. Tobin indicated that it would have probably been passed on to Mr. Dow, and that since Mrs. Morgan had worked in the hospital previously, "personnel would have some references to check on". Mrs. Tobin explained at the hearing that she included herself in "personnel" and that she meant by this that she would have made the check herself. I am afraid that I have to conclude either that this is the testimony of a loyal employee protecting her supervisor, which is very commendable, or else the practice was not as invariable as Mrs. Tobin claimed at the hearing. It does not jibe with the fact that this was by then the third time that Mrs. Morgan had applied for an advertised position and had never received a reply. It does not jibe with the explanation and reasons given by Mr. Dow and Mr. Johnson in November and December, 1975. It is true that Mrs. Tobin left the employ of the hospital at the end of October, 1975, but surely if the hospital management took the complaint at all seriously it could have arranged for someone to speak to Mrs. Tobin. After all, the Human Rights officer was able to find her by February, 1976, to conduct an interview with her.

If it was such an invariable policy that it was Mrs. Tobin who always checked with personnel regarding a previous employee's record, rather than later in the process, surely Mr. Dow, and perhaps Mr. Johnson would have had to know about that. And yet, in every conversation in November and December, 1975, both with Mrs. Morgan and with the Human Rights officer, other reasons were given, such as lack of experience, and later on, the matter of her having taken the wrong course. None of the advertisements made any reference to an approved course. In fact, until November, 1975, the advertisements for Food Service Supervisors made reference only to "two years post-secondary education in the food service area", while Mrs. Morgan had three years. The words "equivalent experience considered", given their ordinary dictionary meaning, surely do not mean "additional experience necessary" which is what was alleged by Miss Hood, the Director of Nutrition. Even if that was what Miss Hood had decided she wanted, she appears not to have communicated it to Mr. Dow, or else he paid no attention to such instructions when he drew up the advertisements.

There was some reference to the fact that the advertisements of November 8th and 9th, 1975, were different in that they referred to "Community College education" being required "plus some experience at the supervisory level". This was presented by Miss Hood as indicating her requirements as to what she was looking for with respect to the position Mrs. Morgan had applied for. However, subsequent to these advertisements, a Miss E.E. was hired who had essentially the same course as Mrs. Morgan, in two years rather than three, at George Brown College which, according to Miss Hood, was like the course at Humber College, where Mrs. Morgan studied and was also not an approved course. On behalf of the hospital, however, it was argued that Miss E.E. had had considerable experience in the food services area on a part-time basis and had had even some full-time experience in a managerial capacity. But on the other hand, Miss E.E. was hired as Food Supervisor II, while the positions Mrs. Morgan was applying for were Food Supervisor I! If Miss E.E., with more experience, but less education, could qualify for the higher position, is there not a strong presumption that Mrs. Morgan had the qualifications at least for the position at the less senior level?

Moreover, when Mrs. Althia McInnis made application on October 3rd, 1975, which was the same day as Mrs. Morgan, Mr. Dow marked on it "wrong course". It is true that Miss E.E. probably had more experience as a dietary aide than Mrs. McInnis, but her supervisory experience was not in a hospital, while that of Mrs. McInnis was. According to the letters submitted by counsel for the Respondent from the Scarborough General Hospital and the Baycrest Centre, Mrs. McInnis had been a Food Supervisor at the former from November 18th, 1974,until June 25th, 1975, and at the latter from December 6th, 1972,until May 12th, 1973, on an "on-call" basis, and on the same basis from March 21st until November 16th, 1974. There does not,therefore, appear to me to be that great a difference between Mrs. McInnis and Miss E.E. as far as pertinent experience is concerned, except that Mrs. McInnis had supervisory experience in a hospital. And yet, although their courses were essentially the same,Mrs. McInnis was was rejected by Mr. Dow because she had taken the "wrong course". I have to say that I found Mrs. McInnis to be an impressive witness. She was precise in her responses and she exhibited the composure of a person who could command respect from employees she might be supervising. The fact that Mr. Dow dismissed her out of hand as having taken the "wrong course", indicates that he was not prepared to give her the same consideration as he gave Miss E.E. The difference in treatment was never satisfactorily explained by him or anyone else on behalf of the Hospital.

Considering these different explanations offered at various times as to why Mrs. Morgan was not considered, considering that they were vigorously argued at different times until shown not to be valid, I cannot but conclude that they were put forth because there was no valid reason for not considering her. In other words, Mr. Dow madea decision that she could not possibly qualify, without any reference to her previous employment at the Toronto General Hospital. The "do not re-hire" letter did not become evident to anyone until the date it was discovered, in December, 1976, a year after the event. Mr. Dow, not Mrs. Tobin, decided that Mrs. Morgan should not even get an interview.

Having concluded that it was not Mrs. Tobin but Mr. Dow, or Mr.

Dow for Mrs. Tobin, who decided that Mrs. Morgan should not be considered for the position, I now have to decide why he did it. Obviously, he did not do so because of her previous employment evaluation. He never even made that claim prior to the hearing, nor did he testify to having seen it. Was there some other reason, or was it because of discrimination? No other reason was put forth by Mr. Dow except for reasons which he gave either with reference to lack of experience or the wrong course being pursued,both of which I have concluded were not applied to any of the white women who applied for the pertinent position in 1975. On Mr. Dow's behalf we have the evidence that was referred to earlier that there appeared to be fair employment practice,at least for non-supervisory employees,at the Toronto General Hospital. One could raise some doubt as to whether the proportions of non-white hirings during Mr. Dow's tenure in 1974 and 1975 were equal to the overall proportion of non-white employees at the hospital. It is certainly well below the proportion of non-whites which was indicated on behalf of the hospital as being members of C.U.P.E. On the other hand, it might very well have been in proportion to the number of non-white employees in other departments. But there was no evidence presented on his behalf or that of the hospital, of his engaging any black people in supervisory capacities while he was Personnel Manager. He could not think of any. The hospital management might have been able to point that out if that were the case, but they did not do so at the hearing. On behalf of Mr. Dow there was testimony given by a black woman whom he had known at a previous hospital, and whom he had helped in obtaining employment at the Toronto General Hospital. His efforts on her behalf were certainly commendable. However, she was not in the category of a supervisor. She had a job in house-keeping and subsequently as a dietary aide.

I have indicated earlier that it is not uncommon for an employer or personnel manager to hire equally people of all races when it comes to non-supervisory positions, but to take a different attitude when it comes to placing people of certain racial or ethnic background in authority over others. And I am afraid that that is what I have concluded appears to be the case with

respect to Mr. Dow. Perhaps it is that his experience comes from another era, but his responses both to the Human Rights officer, Miss Gaspar, and to the summer research assistant of the Ontario Human Rights Commission, who was doing a survey, both of whom interviewed him independently, both of whom made notes very shortly after their meetings with him, noted him as making references to women employees as "girls" or "a nice little girl" on more than one occasion. In these interviews, and on the stand before me, he gave me the impression that he knew exactly in his mind where everyone should be placed. But that is not all.

Both to Miss Gaspar, the Human Rights officer, and to Miss Pullan, the survey research employee of the Ontario Human Rights Commission, he made numerous references to people who have and people who do not have "Canadian work experience". He openly claimed authorship of advertisements which stated "Canadian experience required". Without considering at some length how this could be, and has been, used on many occasions as a screen for discriminatory advertising, it is sufficient to note that he clearly emphasized he was talking about "work habits". This was what he said to Miss Pullan in the summer of 1976, and it was these same "work habits" that he mentioned to Miss Gaspar on previous occasions. In other words, he was not particularly concerned about whether a person had experience of Canadian working techniques, or knowledge of Canadian facts, or acquaintanceship with information about Toronto or Canada, or any of the number of ways in which one might justify a requirement of work experience in Canada. Rather, it was part of his impression as to the "work habits" of Canadians on the one hand and the "work habits" of people in other areas of the world. Although he did make reference to the fact that people from some underdeveloped countries" worked extremely hard, it is not at all clear that this was not more than a mere rhetorical statement, or a reference to some people in some parts of the world rather than other people in other parts of the world. It is true that he was faced with an allegation of discrimination and therefore was probably indignant, but he consistently returned to an argument about "work habits". He had clearly made up his mind about these and in all the circumstances I must conclude that he did not consider the "work habits" of people like Mrs. Morgan or Mrs. McInnis, because of the part of the world that they came from, to be sufficiently adequate for the position of a Food Service Supervisor at the Toronto General Hospital.

Therefore, in this most difficult case, I come to the inescapable conclusion that Mr. Dow, not Mrs. Tobin, screened out Mrs. Morgan, and that he did so certainly on the basis of her "place of origin", and this was synonomous in his mind with her "race" and "ancestry". Furthermore, since he was clearly authorized by the Toronto General Hospital to make the initial decisions as to whether a person should pass on to the Department concerned for a further interview, the refusal "to refer or to recruit", contrary to section 4(1)(a) of the Ontario Human Rights Code, was that of the Hospital. I must now, therefore, consider the remedy.

Remedy

Section 14c(b) of the Ontario Human Rights Code provides that where a Board, after hearing a complaint, has decided that there has been contravention of the Act, the Board

> may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provisions and to rectify any injury caused to any person or to make compensation therefor.

This is not a case where the Complainant, whose complaint has been substantiated, asks for the opportunity for employment which has been denied her. As of the date of the hearing, some two years after the events, she has finally found employment in another city. Therefore, there is no "act or thing" which could now be ordered which would constitute "full compliance with" section 4(1)(a) of the code or which would "rectify any injury caused" to the Complainant and, therefore, the only question is whether "compensation therefor" should be ordered.

Without going into a very detailed analysis, let me just make reference to the fact that Boards of Inquiry in several provinces have held that the compensation referred to in this provision (or in similar provisions in other provinces) would include special damages, which would consist of loss of wages, where applicable, as well as any expenses arising out of the denial of opportunity, and also general damages for the pain and suffering caused by the injury to the dignity of the Complainant because of the discriminatory act. Thus, in the Saskatchewan case of Greyeyes v. Charniera and Charniera, March 1975, the identical words in the Saskatchewan Act were interpreted as including "the authority to award general and special damages and, in a proper case, such damages may include damages for insult and humiliation suffered". In at least three decisions by Chairman Lederman, Gabbidon v. Golas, July, 1973, Shack v. London Driv-Ur-Self Limited, June, 1974, and Segrave v. Zeller's Limited, September, 1975, general damages were awarded in addition to special damages. In the first of these cases, i.e., Gabbidon v. Golas, Chairman Lederman discussed in great detail his conclusions that although, in Canada, punitive or exemplary damages are granted in tort, they should not be granted under the Ontario Human Rights Code. However, based upon an analogy with the granting of general damages in Tort Law, as well as the decision of the English Court of Appeal in Jarvis v. Swan Tours Limited [1973] 1 All E.R. 71, which awarded damages for mental distress, the upset and frustration caused by the defendant's breach of contract, even in the absence of affirmative evidence of the injury being led, he concluded that general damages could be granted to compensate for non-pecuniary injuries such as mental distress, humiliation, upset and frustration. Therefore, I have no hesitation in concluding that in order "to rectify any injury caused to any person", where re-instatement or a like remedy such as an offer of employment is not applicable, a Board can order "compensation therefor", which could include both special and general damages.

Evidence was presented by Mrs. Morgan that she did not obtain employment until April, 1977, and that she did not receive unemployment benefits or any social welfare payments during the period from 1975 to that date. Counsel for the Complainants and the Commission, therefore, claimed that she should be compensated for the whole period from March, 1975, if I found that to be the first date on which she was discriminated against, or at least from October, of that year. Even assuming no raise, at $557.00 per month, which was the starting wage, the amount would be $13,646.00 if March were determined as the time from which to date the discrimination, or $9,190.00, if it were determined that it occurred only as of the later date. In addition, counsel claimed general damages, but did not specify an amount.

Counsel for the Respondent, on the other hand, submitted a number of authorities which indicate that even in the case of dismissal of long-time senior employees, the usual period considered is less than one-year, but that by way of analogy to the Employment Standards Act, no more than one-week should be required in this case.

I must say that compensation equal to two years' wages seems like a very high cost for a refusal to employ, even though, as in this case, we have a person who did not work for that period of time, after not being given the opportunity to be considered for employment. However, I do not have to make this difficult decision because I am forced to the conclusion that the existence of the "do-not-hire" evaluation would have come to light at some stage after the initial interview, if it had been granted.

In other words, if Mr. Dow had not rejected Mrs. Morgan's application because of her place of origin, race and ancestry, but had instead genuinely evaluated her on her educational background and practical experience, and had thus seriously considered her for employment, at some point subsequent to that her previous evaluation would have had to come to light. One could speculate that she might have been able, in subsequent interviews, to overcome that handicap, and one could hope that that possibility would exist,

nevertheless, there was no evidence presented to contradict the evidence that revelation of such an evaluation in the hiring process would act as a bar. There was, in addition, a probationary period of 90 days. At the end of that time, at the very latest, all her records would have come to light. I cannot conclude that this evaluation would have been ignored. I must conclude that at some point between Mr. Dow's interview, had he granted her one, and the time of the evaluation after the probationary period, the 1972 evaluation would have come to light and would have been used either in a decision not to proceed with hiring, or in a decision not to retain after the probationary period. At most, then, the compensation would be around $1671 to $1700.

I come to the conclusion that this is the right amount from another point of view as well. Suppose that Mrs. Morgan would not have been hired at all because between the time of a referral to the Department of Nutrition and the decision to hire, the evaluation would have come to light. At least she would have known that there was a reason which had nothing to do with her place of origin, race and ancestry. She would not have come back time and again to make application and re-application to the Toronto General Hospital itself. She may have felt that the evaluation was unfair, and she may have been angry, but she would not have had to live with the fact of being discriminated against. It is most important to one's personality, character, bearing, and even self-confidence to know that a denial of employment is due to a factor that one can overcome, or change, like a work record, rather than due to a factor that one cannot change, and which is not relevant to employment potential, like one's race, ancestry or place of origin. The discouragement to Mrs. Morgan in putting herself forth to any other employer is incalculable, although considerable. To one seeking a supervisory position especially, which requires greater self-confidence than that of a regular employee, this is a severe blow. Such injury to a person's feelings and dignity, the discouragement and loss of self-confidence resulting, faced as that person would be with the hopeless conclusion that one's impediment is beyond one's power to change, is not to be lightly assuaged even with an amount of $1700. Nevertheless, at least such a grant of general damages might act as an important encouragement to Mrs. Morgan and others that the majority of people in this province,

represented through their Legislative Assembly, do not favour discrimination on irrelevant and unjustifiable grounds, but rather, have declared that it is public policy in this province "that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin".

DATED THIS FOURTEENTH DAY OF OCTOBER,A.D. 1977

W.S. TARNOPOLSKY
Chairman
Board of Inquiry

IN THE MATTER of the Ontario Human Rights Code R.S.O. 1970, c.318, as amended.

AND IN THE MATTER of a complaint by Mrs. Margaret Morgan against the Toronto General Hospital.

ORDER

This matter coming on for hearing on May 25th and 26th, June 28th, 29th and 30th, and September 7th, all in 1977, before this Board of Inquiry, pursuant to my Appointment by Bette Stephenson, Minister of Labour, dated the 2nd day of May, 1977, in the presence of Counsel for the Ontario Human Rights Commission and Mrs. Margaret Morgan, the Complainant, and Counsel for the Toronto General Hospital, the Respondent, upon hearing the evidence adduced by the parties and what was alleged by the parties, and upon the finding of this Board that the Complaint of the said Mrs. Morgan was substantiated and that the Respondent, the Toronto General Hospital, through their Personnel Manager, Mr. Dow, had discriminated against the said Mrs. Margaret Morgan in contravention of section 4(1)(a) of the said Code because of her place of origin, race and ancestry:

> IT is ordered that within thirty (30) days of receipt of this order the TORONTO GENERAL HOSPITAL shall pay to Mrs. Margaret Morgan the sum of $1700.00 (seventeen hundred dollars) as general damages suffered by way of humiliation, injury to feelings and dignity caused by the act of discrimination.

DATED THIS FOURTEENTH DAY OF OCTOBER, A.D. 1977.

W.S. TARNOPOLSKY.
Chairman, Board of Inquiry.